

LEGISLATION AND ADMINISTRATION

COMMERCIAL ARBITRATION UNDER THE N.R.A.*

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THROUGHOUT the entire National Recovery Act and the Codes adopted under it, there appears a simple conflict in principle, odd and yet rational. On the one hand, the government is given control to an extent unthought of in our former regime of *laissez faire*; on the other hand, business has assumed control of matters in a manner prohibited by the same supposedly non-interfering government. Perhaps when our present set-up has had a fair trial, we will have ample demonstration of the place government and industry should play in our reshaped democracy. Meanwhile, there are bound to be demands by business to assume functions heretofore considered as properly belonging to the government, and actual control by the government of functions which eventually will be redelegated to business. One of the most troublesome matters for solution is "who should settle business disputes, and how?" Should it be done in business tribunals; in courts; or is a combination advisable? What place has the arbitration process in our new economic set-up? There have been many suggestions for the inclusion of arbitration provisions in Codes of Fair Competition¹ and standardized contracts adopted as a result of them;² many Codes contain varying types of references to the process. These problems can be answered only by a logical analysis, and should not be discussed on the basis of the high-powered ephemeral sales talk generally found when arbitration is propagandized by its well-meaning professional sponsors. In general it is difficult to ascertain whether business really is asking to share the judicial function or whether pro-

* The subject of arbitration between capital and labor, which has not been covered in this paper, is treated in Phillips, *Function of Arbitration in the Settlement of Labor Disputes* 33 Col. L. Rev. 1366 (1933). The operation of the various N.R.A. agencies for the settlement of labor disputes is there set forth and the thesis advanced that industrial arbitration is but one aspect of unsolved problems of collective bargaining, wherein arbitrators act as agents for the contesting parties to draw up trade agreements. It is totally unlike the commercial prototype.

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¹ See, for example, *Arbitration Provisions in Codes of Fair Competition* (1933), *Arbitration under Industrial Codes* (1933), issued by the American Arbitration Association.

² See, for example, *Arbitration Provisions in Uniform Sales or Purchase Contracts* (1933), issued by the American Arbitration Association.

fessional advertising and lobbying tactics are the only source of the demand.

THE MEANING OF "ARBITRATION"

Arbitration as the word is normally used in the commercial sphere means the adjudication of disputes by private judges of the parties' own choosing.³ It is the business man's substitute for trial.⁴ The entire set of legal rules built up with regard to it is based on that assumption.⁵

In some instances Code authorities are given power to determine by "arbitration" code provisions and practices to make them effective.⁶ The use of the word arbitration is a misnomer. The Code authorities in these cases are legislating, making contracts if you will, but they are not exercising a judicial function. They are not settling disputes, except in the sense that a legislature might do so. General Johnson's remarks in connection with the hearings on the Cotton Code are instructive:

There has been some newspaper criticism in permitting new matter so late in the hearing. This springs from a misconception of the nature of this procedure. It is an administrative process to arrive at a just result. It is not an adversary judicial trial.⁷

So too, when a Code authority determines facts constituting a violation of the Codes, it is not acting as an arbitrator in the business sense⁸ but rather as a governmental administrative body, whose determination probably is subject to review by other administrative bodies, or by the courts.⁹

³ See Code of Arbitration: Practise and Procedure (1931), 60. It seems well settled that the office of an arbitrator is judicial in its nature. Cf. *Matter of American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N.Y. 398, 148 N.E. 562 (1925). His award under many arbitration statutes is made the immediate basis of judgment and execution, and in general is as unassailable as the judgment of a court. Cf. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392 (1875). His is not a task to legislate or make contracts, a matter which courts cannot do. *Matter of Buffalo & Erie Ry. Co.*, 250 N.Y. 275, 165 N.E. 291 (1929); note 42 *Harv. L. Rev.* 821 (1929); but see *In re Southern Pacific Co.*, 155 Fed. 1001 (C. C. Cal. 1907).

⁴ "The purpose of arbitration is essentially an escape from judicial trial," *Kraus Bros. Lumber Co. v. Bossert & Sons Inc.*, 62 F. (2d) 1004, 1005 (C.C.A. 2d, 1933).

⁵ Cf. *Isaacs, Two Views of Commercial Arbitration* 40 *Harv. L. Rev.* 929 (1927); *Wheless, Arbitration as a Judicial Process of Law* 30 *W.Va. L. Quar.* 209 (1924); *Berizzi Co. v. Krausz*, 239 N.Y. 315, 146 N.E. 436 (1925).

⁶ Cf. e.g. *Ice Industry Code*: "A Committee of Arbitration and Appeal may be created, which Committee shall, subject to the approval of the Administrator, interpret this Code and make application of it within its territory, prescribe practices for making effective the intent of the Code in the territory, hear controversies arising out of the application of the Code and to make recommendations thereon to the Code Authority."

⁷ *Prentice Hall, Federal Trade and Industry Service*, footnote § 12, 001.7.

⁸ The law has long prohibited the settling of criminal cases by arbitration. See *Hall v. Kimner*, 61 Mich. 269, 28 N.W. 96 (1886).

⁹ That a review of the findings of a criminal nature would be subject to court review does not seem to be open to much doubt. Cf. in general, *Isaacs, Judicial Review of Administrative*

A study of such functions belongs to the field of administrative law, and not arbitration. To use the word arbitration to apply to any extra-judicial process, simply because a dispute is involved and other than court judges resolve it, is too simple a subterfuge to hide the true nature of the procedure. It seems to be a popular device to call any such process "arbitration" when hard pressed for terminology to arouse popular support. Witness, for example, the Kansas Compulsory Labor *Arbitration* experiment,¹⁰ which was anything but a voluntary submission to judges of the parties' own choosing, and yet the word "arbitration" was used to cover up a bureaucratic method of determining labor conditions.

In this paper arbitration will be considered as a substitute for judicial process, which is its use in everyday jurisprudence. When business assumes a legislative function and calls that arbitration, a danger looms large if the process is subjected to the rules applying to arbitration as normally considered. That, however, is outside the scope of this document. But a *caveat* should be ever present in the minds of Code authorities to differentiate between their actions of a judicial and a legislative nature.

USE OF ARBITRATION BY TRADE ASSOCIATIONS

The use of arbitration for the settlement of commercial disputes by trade associations is not a new development. Guilds of old resolved members' controversies by it, merchant courts practised a species of it, and in the past thirty years trade associations commonly required their members to arbitrate disputes with each other.¹¹ More frequently, the trade association suggested arbitration by their members, actively persuaded them to enter into agreements to arbitrate after a dispute had arisen, or to agree

Findings 30 Yale L. Jour. 781 (1921); Tollefson, Administrative Finality 29 Mich. L. Rev. 839 (1931). On the other hand, arbitrations in the nature of legislation would not be open to court review; cf. *Keller et al. v. Potomac Electric Power Co. et al.*, 261 U.S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731 (1923); this because of their nature. A final judgment could not be entered on such an award.

Courts would not enter judgment on award if that could later be modified or attacked by an administrative tribunal; e.g., a Code Authority. Such action in itself would destroy the judicial nature of the proceeding. Cf. *Gordon v. U.S.*, 117 U.S. 697 (1864). And see in general, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 Sup. Ct. 284, 73 L. Ed. 478 (1927); *Ex parte Bakelite Corp.*, 279 U.S. 438, 49 Sup. Ct. 411, 73 L. Ed. 789 (1929).

¹⁰ Kans. Rev. Stat. (1923) c. 44, §§ 601-628; Cf. Simpson, Constitutional Limitations on Compulsory Industrial Arbitration 38 Harv. L. Rev. 753 (1925); Feis, The Kansas Miners and the Kansas Court 43 Survey 822 (1922). It is not meant to be implied that the labor tribunals set up under the N.R.A. are in any way like the Kansas Court of Industrial Relations, or that the N.R.A. has in any manner been guilty of a like confusion in terminology.

¹¹ Year Book on Commercial Arbitration (1927), 1166 gives a list of such associations, and the book in general contains the by-laws providing therefor.

in their contracts to arbitrate any which should arise in the future. Most of these arbitrations were conducted under the supervision and administration of the associations.¹² *Compulsory* trade association arbitration often proved unsatisfactory in that the arbitrators were apt to be prejudiced in favor of large members of the industry, with whom they came into contact directly or indirectly; and under the guise of arbitration certain groups within an industry were able to compel monopolistic control, to the great disadvantage of the small members of the trade.¹³ There were, however, many very fair and well worked out arbitration set-ups, especially of the voluntary type. While the use by a trade association of standardized contracts containing arbitration clauses can lend itself to much hardship and sharp practise,¹⁴ in general, if properly used, arbitration furnishes a speedy, expeditious and inexpensive method of fact determination by business experts and serves to relieve business of the technicalities, expense and delay of legal trial in many cases.

At common law arbitration agreements received little support from the courts, and were revocable at will.¹⁵ In twelve states modern statutes have been passed, making valid, irrevocable and enforceable a provision in a written contract to arbitrate a dispute thereafter arising, or an agreement to arbitrate an existing dispute.¹⁶ Elsewhere, however, there is no effective method of enforcing an arbitration agreement in a contract; and the methods of enforcing an agreement to submit an existing dispute are

¹² See rules contained in *op. cit. supra* note 11.

¹³ Cf. *Paramount Famous Lasky Corp. v. U.S.*, 282 U.S. 30, 51 Sup. Ct. 42, 75 L. Ed. 145 (1930); *Paramount Famous Lasky Corp. v. National Theatre Corp.*, 49 F. (2d) 64 (C.C.A. 4th, 1931); *Universal Film Exchanges v. West*, 163 Miss. 272, 141 So. 293 (1932).

¹⁴ Cf. Phillips, *The Paradox in Arbitration Law* 46 Harv. L. Rev. 1258, 1273-76 (1933).

¹⁵ *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923); *Shafer v. Metro-Goldwyn-Mayer Distributing Corp.*, 36 Ohio App. 31, 172 N.E. 689 (1929). See also Hulvey, *Arbitration of Commercial Disputes* 15 Va. L. Rev. 238, 239 *et seq.* (1929). On the entire matter of enforcement of arbitration agreements see Sturges, *Commercial Arbitration and Awards* (1930), 43-262. The book is the outstanding American work on arbitration and should be consulted for all arbitration problems. See also the unusually fair and excellent statement regarding the enforcement of arbitration agreements in Chafee and Simpson, *Cases on Equity* (1933), 552 *ff.*

¹⁶ *Ariz. Rev. Code* (1928) §§ 4294-4301, as amended by Laws 1929, c. 72, § 1-4; *Cal. Code Civ. Proc.* (1931) §§ 1280-93; *Conn. Gen. Stats.* (1930) §§ 5840-56; *La. Gen. Stat.* (1932) §§ 405-22; *N.H. Pub. Laws* (1926) c. 174; *N.J. Comp. Stat.* (1924 supp.) § 9, 21-36; *N.Y. Cahill's Consol. Laws* (1930), c. 2, § 1-10; *N.Y. Civ. Prac. Act* (1927) §§ 1448-65, 1469; *Ohio Page's Ann. Gen. Code* (1932 supp.) § 12148 (1-17); *Ore. Code Ann.* (1930) §§ 21-101-21-103, *Laws* 1931, Act No. 38; *Pa. Purdon's Stat.* (1930) tit. 5, §§ 161-81; *R.I. Acts of* 1929, c. 1408, §§ 1-18; *Wis. Stats.* (1931) §§ 298.01-298.18. There is also the United States Arbitration Act, 43 Stat. 883 (1925), 9 U.S.C. §§ 1-15 (1926), applying the principles of the Draft Act to contracts in interstate commerce and maritime trade. Cf. *California Prune and Apricot Growers' Ass'n v. Catz American Co.*, 60 F. (2d) 788 (C.C.A. 9th, 1932).

none too certain and rarely used.¹⁷ In fact, no method of specifically enforcing an arbitration agreement seems to have achieved its purpose; the benefits of the process, speed, cheapness and friendliness are obviously lost by resort to compulsion.¹⁸ Provisions in trade association by-laws that members failing to arbitrate will be expelled from the association, or fined, or otherwise penalized, have been upheld and enforced by the courts.¹⁹ In a few states statutes provide that such provisions shall be respected by the courts,²⁰ and it is possible in one State to specifically enforce an arbitration provision in the by-laws of a trade association.²¹

A more interesting question is whether the provisions of the N.I.R.A. will furnish aid in the enforcement of arbitration provisions.²² Suppose, for example, a Code provides that members of an industry shall arbitrate certain types of disputes, or their standardized contract, adopted as a result of a Code, contains an arbitration clause. Such provisions are invariably included as fair practise. Does this bring Section 3(b) of the Act, providing that the violation of a fair standard is an unfair method of competition, within the meaning of the Federal Trade Commission Act, a violator of which is subject to a cease and desist order enforceable by the courts, or can the federal district attorneys proceed under Section 3(e) to enjoin violations? An arbitration provision can be violated not only by refusing to arbitrate, but by bringing a suit in court. It is inconceivable that the President's licensing power would be used to compel observance

¹⁷ The statutes in these states generally provide that an agreement to arbitrate an existing dispute, if made according to certain formulae, shall be irrevocable, but no method of specific performance is provided, and *quaere* whether the courts would do more than stay an action brought in violation of such an agreement. Cf. *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 129 N.E. 753 (1921). As to whether arbitrators appointed can proceed *ex parte* should one side refuse to continue, compare *Lockett v. Thorne*, 221 Ill. App. 621 (1921); *Bullard v. Morgan H. Grace Co.*, 240 N.Y. 388, 148 N.E. 559 (1925); *Finsilver Still & Moss v. Goldberg, Maas & Co.*, 253 N.Y. 382, 171 N.E. 579 (1930); *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374 (1901).

¹⁸ Cf. Isaacs, *Review of Sturges, A Treatise on Commercial Arbitration and Awards* 40 *Yale L. Jour.* 149 (1930); Skeen, *Review of Yearbook on Commercial Arbitration in the United States* 17 *Calif. L. Rev.* 190 (1929); Nordon, *Arbitration*, 162 *L.T.* 262 (1926); Weidlich, *A Test of Compulsory Arbitration in New York* 4 *Conn. B. Jour.* 95 (1930).

¹⁹ Cf. *Pacaud v. Waite*, 218 Ill. 138, 75 N.E. 779 (1905); *Moffat v. Board of Trade of Kansas City*, 250 Mo. 168, 157 S.W. 579 (1913); *Gerseta Corporation v. Silk Association of America*, 200 App. Div. 890, 192 N.Y. Supp. 370 (1922).

²⁰ *Minn. Mason's Stats.* (1927) § 7904; *Neb. Comp. Stats.* (1929) § 44-910 (mutual assessment association); *Wis. Stat.* (1931) 180.26. There are many private statutes enforcing the arbitration by-laws of particular trade associations, e. g. *New York Laws of 1862*, c. 359; *Md. Code Public Local Laws* (1930), *Baltimore City* §§ 226-228.

²¹ *Conn. Gen. Stats.* (1930) § 5840.

²² For a concise statement and discussion of the possible methods of enforcing the Act see *Some Legal Aspects of the National Recovery Act* 47 *Harv. L. Rev.* 85, 95 *et seq.* (1933).

of arbitration, regardless of the size of the dispute or the Code provisions. The executive could thus reduce the doctrine of separation of powers to historical oblivion.

The fine of a merchant who sued in violation of an arbitration agreement would in but few cases be sufficient to compel him to arbitrate. But can we expect the courts to fine a merchant because he came to court, or order him to stay out because of a provision in a Code requiring him to arbitrate his disputes? Did the N.R.A. intend to deprive business of the use of courts for the settlement of commercial controversies? It would be a *reductio ad absurdum* for courts to compel a suitor to stay from without their purview under a doctrine of *fair competition*! There is something fundamental to court jurisdiction; there alone the public, which in the end pays the bill, can find protection. There alone a suitor can find specialized legal knowledge and training gained from years of experience so necessary in the settlement of many disputes. The judicial branch of the government will continue to extend facilities for the adjudication of business disputes to merchants who desire to use them.²³

USE OF ARBITRATION TO EFFECT ADJUSTMENTS OF CONTRACTUAL TERMS

By far the greatest use of the arbitration process has been in connection with the adjustment of contracts entered into before the passage of the N.I.R.A. or the Codes. The President suggested that merchants get together in amicable adjustments,²⁴ and it seems fundamental that unfore-

²³ The old common law decisions which refused to support and enforce arbitration agreements on the ground that they "ousted the jurisdiction of the courts" have been criticized by many as illogical and reached by courts because of petty jealousy over their own jurisdiction. Cf. Cohen, *Commercial Arbitration and The Law* (1918); *U.S. Asphalt Refining Company v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S.D.N.Y. 1915). The criticism is perhaps justified when applied to occasional arbitration agreements, but when the government is taking an active role in business affairs it seems a bit illogical to expect courts to permit a whole industry to bring its disputes from without their purview. A wholesale planned ouster of courts' jurisdiction is entirely different from an individual arbitration agreement.

²⁴ "In a few industries, there has been some forward buying at unduly depressed prices in recent weeks. Increased costs resulting from this government-inspired movement may make it very hard for some manufacturers and jobbers to fulfill some of their present contracts without loss. It will be a part of this wide industrial cooperation for those having the benefit of these forward bargains (contracted before the law was passed) to take the initiative in revising them to absorb some share of the increase in their suppliers' cost, thus raised in the public interest," statement of President Roosevelt, upon signing the N.I.R.A. See N.R.A. Bulletin No. 1. Some Codes suggest a simple adjustment in accordance with this, e.g. Marking, Wool Textile, Advertising Specialty, Packaging Machinery. Note also the Petroleum Code which provides that its provisions shall not apply to contracts made prior to the date of its formal approval. The citations to the Codes are not intended to be exhaustive in this footnote or subsequent footnotes; they are designed rather as illustrative of the text material.

seen increased costs caused by the Act or Codes should not be made to cause hardship. A great number of Codes declare that: "Where the costs of executing contracts entered into²⁵ prior to the approval . . . of the Code²⁶ have been increased by the application of the Act,²⁷ it is equitable or promotive of the purposes of the Code that there be adjustment by arbitration or otherwise." In a few instances, it is intimated that extensions of time²⁸ or provisions in a contract inconsistent²⁹ with the Codes should be similarly treated. It should be carefully noted that these provisions are purely exhortatory, and no method of enforcing them seems available. It would be perfectly possible, however, for an individual trade association or trade to provide in its by-laws or Code that these adjustments must be made by arbitration, and such provisions would encounter the enforcement problems raised previously. But when *voluntary* adjustments cannot be made by arbitration or otherwise, the parties should be left to their legal remedies. The argument that courts could not offer any remedy to effect needed adjustments is without force. If social policy demands relief from contractual terms existing rules of law should suffice,³⁰ or new rules of law will be evolved³¹ by courts with the assistance of astute coun-

²⁵ Industrial Supplies and Machinery, Cotton Textile, Leather, Motion Picture Laboratories. It would seem that this should be meant to apply only to contracts entered into prior to the approval of the Code. After a Code is adopted, merchants may readily contract with regard thereto. Those who do not do so must be presumed to have assumed the risks of "code raises" in their price, and to allow adjustments of all contracts would place too great a premium on sharp practise to be resisted by many unscrupulous business men. See, also, the Can Manufacturers' Code and the Excelsior Code.

²⁶ Gasoline Pump, Ice, Lace Manufacturing, Oil Burner, Salt, Umbrella, Cap and Closure, Gas Cock, Road Machinery Manufacturing. The wording of the Codes differs, and in place of "prior to the approval of the Code" is found such language as "to the presentation of the N.I.R.A. or the adoption of this Code" (Ship Building); "effective date of this Code" (Fishing Tackle); "already entered into" (Men's Clothing).

²⁷ Gasoline Pump, Ice, Lace Manufacturing, Oil Burner, Salt, Umbrella, Cotton Textile. In place of "act" such slight differences of wording appear as "Act and Code" (Motion Picture, Men's Clothing); "Act or Code" (Ship Building); "Act and/or Code" (Industrial Supplies and Machinery); "Code provisions" (Cap and Closure, Fishing Tackle, Leather); "effect of Code" (Gas Cock); "This Code or any other Code" (Road Machinery Manufacturing).

²⁸ Road Machinery Manufacturing, Wool Textile.

²⁹ Fur Trapping Contractors, Road Machinery Manufacturing.

³⁰ For a discussion of possible methods which could be used by courts to afford relief see *Some Legal Aspects of the National Recovery Act* 47 Harv. L. Rev. 85, 115 *et seq.* (1933).

³¹ The argument that because of its use of judicial precedents the law cannot make new rules is spurious:

"Spencer's proposition that the law is a government of the living by the dead . . . is a most misleading statement. It is not, for any great part, that rules made by or for the dead are governing the living. It is rather that the past has given us analogies, starting points for reasoning and methods of developing the authoritative legal materials, which are still serviceable."

Pound, *A Comparison of Ideals of Law* 47 Harv. L. Rev. 1, 7-8 (1933).

sel, to provide it. The development of such rules in themselves will make for many voluntary adjustments.³² Compelling a buyer who has driven a particularly hard bargain to raise the price is often fair. But if any seller could willy-nilly compel arbitration to effect adjustments on all contracts, his would be an unfairly advantageous position. Arbitrators are not bound by rules of law,³³ and it is possible therefore, if mandatory adjustment of contracts by arbitration is provided for, for an unscrupulous seller to demand and compel it regardless of how frivolous his claim.³⁴ The hardship on buyers is especially apparent in those types of Codes providing for adjustment of all contracts entered into prior to the "approval of the Codes." Contracts executed after the passage of the N.I.R.A. invariably took it into account; to allow mandatory adjustment by arbitration of these would give sellers a tremendous lever for price raising, in a contract already dictated in a sellers' market, in which (if the contract itself did not provide for automatic adjustment of price) the price was originally fixed to allow ample leeway for the seller. Many buy-

³² This would seem to be a very advantageous place to apply the declaratory judgment device. Merchants in order to do business profitably must know their rights in advance and declaratory judgments on the adjustment rights would set at rest any doubts which are prevalent. Cf. *Bieber & Co. v. Rio Tinto Co., Ltd.* [1918] A.C. 260; *Russian Commercial and Industrial Bank v. British Bank* [1921] 2 A.C. 438; *Manchester Corporation v. Audenshaw Council* [1928] 1 Ch. 127, 763; *Borchard, Judicial Relief for Insecurity* 33 Col. L. Rev. 648 (1933). The contrast of the security offered by declaratory judgments and insecurity provided by arbitration *in future* is significant.

³³ This is true at common law, and under most arbitration statutes. Cf. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392 (1875). It is true that under a few arbitration statutes (see *Sturges, op. cit.* note 15, 500-510), the arbitrators may be required to follow rules of law, but these statutes in the main apply to cases of voluntary agreements to submit an existing dispute to arbitration. As has been pointed out, they are generally not the type of statute under which arbitration is compelled. Furthermore, if the arbitrations are compelled because of provisions in Codes or trade association by-laws, they are not arbitrations under the arbitration statutes, but arbitrations in which the rules of the common law should govern. Of course, it is possible that the courts might, if this type of arbitration were found to produce great hardship, say that arbitrators are bound by rules of law, but to do so would mean the overruling of a great deal of well-established law, supported by business men themselves.

³⁴ Since the arbitrators are not bound to follow rules of law the courts cannot deny a motion to compel arbitration on the ground that the claim of the petitioner does not make out a legal case. "Where a *bona fide* dispute in fact arises over the performance of a contract of purchase and sale it does not devolve upon the court to say as matter of law there is nothing to arbitrate." *Matter of Wenger & Co. v. Propper Silk Hosiery Mills*, 239 N.Y. 199, 202-203, 146 N.E. 203 (1924). And cf. *Vulcan Foreign Commerce Corporation v. Verhog*, N.Y.L.J., August 1, 1924, where it was held that if the parties make opposing contentions, it cannot be said "there is no dispute under the contract" and arbitration will be ordered. It is well recognized in New York that the presence of an arbitration clause furnishes an unscrupulous party with an easy avenue to obtain petty improper demands, for if these are not satisfied arbitration may always be compelled. Rather than be annoyed with arbitration, the demands are generally acceded to.

ers would "consent" to repeated raises in prices rather than be annoyed by constant arbitrations, and the consumer in the end would pay the bill. In the event that adjustments cannot be voluntarily entered into, or the parties voluntarily agree to their being made by arbitration, it seems far better that a court of law decide whether social policy and economic necessity demand or warrant adjustment. Business stability rests on fundamental observance of terms of contracts and, if there is to be mandatory setting aside of their express provisions, it should be done by courts trained in the law, and not by business men chosen *ad hoc* for each dispute, who will generally mete out individual decisions by inspiration rather than utilitarian justice by logic and social policy.

CODE PROVISIONS FOR ARBITRATION IN THE SETTLEMENT OF COMMERCIAL DISPUTES

There have been few Code provisions made for arbitration in the event of commercial disputes arising out of the ordinary course of business transactions. Rarely does a Code provide that the members of a trade *must* arbitrate all their disputes with each other.³⁵ But there are several instances where Codes *suggest* arbitration as a much desired medium for the settlement of all commercial controversies. The Automatic Sprinkler Code is typical of this type:³⁶

The use of arbitration in the settlement of commercial disputes between employers or between buyers and sellers under the arbitration rules of the American Arbitration Association³⁷ is recognized as an economical and effective method of adjusting business controversies.

On the other hand, other Codes suggest a much more limited use of the process; for example, the Corset and Brassiere Code encourages arbitration for disputes as to:

Quality or as to whether or not merchandise delivered is comparable with original sample.

³⁵ And there is doubt as to the meaning of these. The Handkerchief Code *e.g.* provides that in the event disputing members of the industry "are unable to agree, the dispute should be settled by arbitration as provided by the American Arbitration Society." (Inasmuch as the American Arbitration Society went out of existence in 1926, the provision probably refers to American Arbitration Association.) See also the provisions for the Hosiery Codes discussed *infra*, p. 435. Compare the provisions of the Motion Picture Code, the most complete of the codes thus far submitted.

³⁶ Cf. *e.g.* Codes for the Retail Lumber Industry and Textile Machinery Industry. Compare the provision in the Millinery and Dress Trimming Code:

"The Code authority shall have the following duties and powers to the extent permitted by this Act and subject to review by the Administrator. . . . It shall assist in the arbitration of disputes between members of the industry."

Compare also the exhortatory arbitration provisions of the Motion Picture Laboratory Code, laying down a more complete procedure.

³⁷ The meaning of arbitration under these rules is discussed *infra* notes 46, 47.

The Lumber Code suggests that arbitration be used in disputes involving \$50 or more and arising out of transactions in respect to the sale of lumber and timber products, except as to grade or tally.

Exhortatory limited arbitration provisions are excellent advances in forward looking business policy. The efficacy of a mandatory general provision is doubtful. The latter, in effect, lays down as a policy that all disputes between merchants *must* be settled out of court, and thereby closes the doors to judicial relief even in cases most urgently demanding it. The results of absolute mandatory enforcement of arbitration agreements in the past have been highly unsatisfactory.³⁸ But the objection goes deeper; if an industry says all disputes must be settled in *its* tribunal, it makes the particular tribunal a sort of public functionalized court in and of itself; the particular process would no longer be arbitration as it is ordinarily known, but a new type of suit—with all the stigmas attached to suits by proponents of arbitration.³⁹ Outside of the possibility of grave injustice being done to individual disputants, there is the deep social objection that the government, through its courts, would be entirely deprived of control over business disputes, unable to lay down social policy, unable to insure standardization through properly worked out rules of law, unable perhaps even to reach in upon disputes involving constitutional questions. Indeed, under the guise of deciding individual disputes, lay arbitrators might completely emasculate the N.I.R.A.⁴⁰ Certain it is that the courts, by direct disregard or subtle evasion of the mandatory arbitration provisions, would prevent industrial anarchy from thus arising. Wholesale ousting of court jurisdiction would be bitterly opposed by the Bar; lawyers would be worthless as far as advising their clients on the law—for the law would be what a particular business tribunal decided it to be; well worked out agreements could not be made, for no one could tell in ad-

³⁸ Cf. *supra*, notes 14 and 18.

³⁹ Cf. Magrith, *Commercial Arbitration*, 38 Ohio L. Rep. 188 (1932). Conceding for the sake of argument that a system of industrial tribunals should be established, that does not mean they should be created aimlessly. There is no reason why the private arbitration analogy should be followed in their creation. A tremendous amount of research and planning would be necessary before it should be attempted. For example, the fact that the courts of the merchants' fairs were established to secure uniform law for merchants all throughout western Europe (see Thompson, *The Development of the Anglo-American Judicial System* (1932) 25, and references therein cited) illustrates an immediate need of first deciding the rules of law the proposed new tribunals should lay down. Business is confusing the need for procedural reform with the needs of substantive law. The crude attempt to provide a new procedural form without proper preliminary attempt would not only entail an adoption of poor procedure, but a destruction of good substantive law.

⁴⁰ It is unthinkable, however, that the courts would allow this to come to pass. They would undoubtedly by evasion or direct methods compel arbitrators to follow rules of law.

vance what might be the "law" applicable to them, or its effects. Setting up courts within an industry under the misleading term of arbitration is entirely out of keeping with the partnership between government and industry and means the substitution of the raggedly individualistic merchant tribunals for the standardized, orderly, socialized process of law.⁴² Can it be contended that the N.I.R.A. meant to charter each group to establish its own courts after the fashion of medieval fairs? Did Congress mean to destroy the judiciary's function in business disputes? What logical connection has "arbitration" as thus used with business recovery, higher wages and shorter hours? Can it be that the professional sponsors of arbitration have seized on the N.R.A. as an excuse to advance a movement which has no connection with industrial recovery?

The criticism of Dean Pound, directed against jurisdictional differences in law, that:

The economic waste of having many bodies of divergent local law potentially applicable to every business of importance and every economic activity of consequence, and of disputes as to which of these bodies of law should control them, speaks for itself. . . . At any rate, in commercial law and in the law governing enterprises, the regime of divergent local laws is economically wasteful and productive of no useful results⁴³

is more strikingly applicable to any system of private arbitration, varying as it must from trade to trade, city to city, case to case. True, the law is not perfect; but, instead of being forced to grow utilitarian by its own shortcomings, it has naturally evolved and kept pace with social conditions and ideals. Dean Pound's statement of the present condition of the law shows its applicability to our present ideals:

Where the last century saw only individual interests, the law of today is more and more subsuming them under social interests. Where the last century saw all claims as asserted in terms of the individual life, the law of today is more and more seeing them as asserted in terms of or in title of social life. Where the last century hewed to an ideal of competitive self-assertion, the law of today is turning to an ideal of cooperation.⁴⁴

Procedural changes are imperatively needed to keep pace with changing conditions; perhaps a speedy system of determining business fact by business experts instead of our slow inexpert jury system should be installed, but the fundamental nature of substantive law far outweighs the advantages which could be gained from divergent private arbitration.⁴⁵

⁴² "To say that such cases can be or will be better dealt with by untrained arbitrators . . . is to ignore the teachings of experience and to deny the value in the field of litigation at last of training, experience and expert knowledge." Stone, *The Scope and Limitations of Commercial Arbitration* 10 *Pro. Acad. Pol. Sci.* 501 (1922).

⁴³ Pound, *A Comparison of Ideals of Law* 47 *Harv. L. Rev.* 1, 11-12 (1933).

⁴⁴ Pound, *op. cit. supra* note 43, at 15.

⁴⁵ Our legal procedure in general has always been an outgrowth of economic necessity: "The present . . . courts, though created by statute, were dictated by history. He is a wise lawyer

USE OF ARBITRATION TO DETERMINE FAIR COMPETITION

The American Arbitration Association recommends the following for insertion in Codes of Fair Competition:⁴⁶

It is declared to be the policy of this industry that any complaint, difference, controversy or question of fair competition which may arise under or out of this Code shall be submitted to arbitration.

Any complaint, difference, controversy, or question of fair competition which may arise between a member of this trade and a member of any other industry or trade under or out of this Code, or a Code of Fair Competition adopted by such other industry, or any question involving a conflict between the provisions of this Code and of any other Code affecting this industry, may be submitted to arbitration.⁴⁷

And a few Codes have adopted somewhat similar phraseology.⁴⁸

who knows the history of the law and the institutions in which it has been moulded, for there are times in great cases, when as Mr. Justice Holmes observed in an opinion but a decade ago: 'A page of history is worth a volume of logic.' " Thompson, *The Development of the Anglo-American Judicial System* (1932), 142.

⁴⁶ Arbitration under Industrial Codes (1933), 2.

⁴⁷ Note the further provision: "The Code authority should provide appropriate facilities for arbitration, and subject to the approval of the Administrator, shall prescribe rules of procedure and rules to effect compliance with awards and determinations. Until such rules are adopted, arbitration according to the Rules of the American Arbitration Association for arbitration under Codes shall be accepted as the method for the adjudication of such matters."

The "Rules for Arbitration under Codes" provide that they shall be applicable when the Arbitration Committee of the Association decides that its regular arbitration rules are not adapted to the situation in hand. The former rules are very sketchy, the latter fairly complete. The latter are the ones which the Association recommends using in all disputes arising under contracts. It should not be supposed that these rules merely lay down the rules of proceedings to be followed, and concern themselves with such matters as evidence, adjournment and the like. Instead, they provide an absolute guarantee against any lapses in the proceedings, and thus, for example, if the parties fail to appoint arbitrators or agree thereon, the association does that for them. In that way a New York organization, without a practising attorney on its fast fluctuating staff could control industrial self-government. Fortunately, the clerk of the arbitration tribunal, J. Noble Braden, is unusually well grounded in arbitration procedure, and is a man of such outstanding honesty and ability that he can be trusted to see that the arbitrations before him are conducted fairly and well. He has built up a well-organized, logical system of arbitration for general use in New York City.

⁴⁸ *E.g.*:

"All disputes, pertaining to the interpretation of the fair trade provisions described in this Article of the Code, shall be submitted to such forms of arbitration as may be set up by the Association." (Hosiery Code);

"Any complaint, difference, controversy or question of fair competition which may arise between a member of this trade and a member of any other industry or trade under or out of this Code, or a code of fair competition adopted by such other industry, or any question involving a conflict between provisions of this Code and of any other Code affecting this industry, may be submitted to arbitration under the Rules of the American Arbitration Association." (Retail Lumber Code.)

But note the modulation in terms as compared with the proposal of the American Arbitration Association.

The first paragraph of the proposed clause⁴⁹ furnishes any party to a dispute an easy escape from court jurisdiction. Suppose, for example, A and B have a dispute regarding the fulfillment of a contract; B, desiring to delay and avoid process, raises a question of unfair competition or as to the construction of a Code in connection with the transaction. Is the issue of fulfillment to be tried before a court and that of unfair competition to be determined by arbitration, despite their arising from the same dispute? Such a result would be most wasteful,⁵⁰ and conceivably might result in conflicting decisions. On the other hand, to try the entire issue before arbitrators, when the parties or Code may not have provided therefor, is obviously unfair; an eventual decision by the arbitrators that there was no question of Code or unfair competition involved would in effect destroy their jurisdiction and send the matter *de novo* into court.⁵¹

Fundamentally, however, when the question of fair competition is involved, a court decision is imperatively indicated. True, a business arbitrator is better qualified to *determine* the business *facts* alleged to constitute unfair competition than a lay jury, untrained in the intricacies of business relations; and if the arbitrators were thus limited, we would have a sane, quick and economic method for presentation of fact to courts or permanent administrative bodies. But to make it mandatory for lay arbitrators to determine the ultimate legal effects of unfair competition is depriving society of a check on a phase of business needing public con-

⁴⁹ The clause is highly ambiguous in its wording. For example, how much does "which may arise under or out of this Code" modify? Who is to determine such questions? Is an arbitrator's decision thereon binding on the courts? It should be recalled that the courts in the past have decided that they may interpret the instrument which gives jurisdiction to the arbitrators and that the arbitrators shall be limited to what the court deems is the jurisdiction conferred on them by the instrument creating their office. *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929); *Dodds v. Hakes*, 114 N.Y. 260, 21 N.E. 398 (1889).

⁵⁰ Such a spectacle, however, is not too unusual under the Draft State Act. See *Smith Fireproof Construction Co. v. Thompson-Starrett Co.*, 247 N.Y. 277, 160 N.E. 369 (1928).

⁵¹ Suppose A and B get into a dispute about the quality of merchandise, and upon suit by A, B claims that there is a question of unfair competition and asks for an order compelling arbitration. May the court first pass on the issue before ordering arbitration, or is it bound to send the matter to arbitrators for their decision and hold the suit in abeyance on the issue of quality until the arbitrators have decided? It has generally been contended that the court should allow the arbitrators to pass on such issues, but, if the court should pass on the issue, there is indication that the arbitrators are not bound by the decision of the court. Thus, if the court determined there was unfair competition before ordering arbitration of that issue, the arbitrators might nevertheless find that there was no unfair competition. A similar problem arising under the Draft State Act, when it is not complicated by all the social issues raised in unfair competition, is discussed in Phillips, *Paradox in Arbitration Law* 46 Harv. L. Rev. 1258, 1270-1272 (1933), and references therein cited.

trol⁵² and out of step with the philosophy of a government partnership.⁵³ Fairness demands uniform rulings on unfair competition such as courts alone can render, and uniform application of law such as arbitration cannot accomplish.

The first paragraph of the clause is broad enough to include the making by arbitration of Code provisions, to legislate or perform executive functions—if only a complaint, difference, controversy or question of unfair competition can be raised. How are these “decisions” to be enforced? Are they only binding on individual disputants, so that myriad of varying Code provisions in effect can be made to apply differently to different members of the same industry by the use of the “arbitration device”? The obvious confusion which results from the intermingling of judicial arbitration in the same clause with a process fundamentally legislative demonstrates the need for clarification, and an outline of exactly how this proposed plan will operate.⁵⁴

The second part of the clause is exhortatory, and thereby not subject to any serious practical objection. But should disputes between merchants in different industries, arising under conflicting Codes be settled by private methods? There is a strong consumer interest in intertrade disputes. Harmonizing conflicting provisions in two Codes is really a problem of making a new Code for a peculiar type of industry. Why should it not be taken care of in the same manner as an original Code, where all parties who may be concerned can be represented and can obtain a definite ruling

⁵² “When the parties to a contract . . . [arbitrate] . . . they elect a tribunal which has its obvious advantages and its equally obvious disadvantages. Its advantages consist in the rapidity of its procedure and its familiarity with the business to which the contract relates; and one of its chief disadvantages consists in its inability to decide the questions of law which are bound to arise before it. . . .”

In re Fischel & Co. and Mann & Cook [1919] 2 K.B. 431, 442.

⁵³ It is not contended that the courts are perfect, or that we have an ideal system of judicial government. But merely because our courts may not be all that business or *lawyers* ask of them is not *per se* an argument making an absolute ouster of them necessary. In such a social issue as unfair competition, the remarks of Judge Julian Mack are especially appropriate:

“You and I would be derelict in our duty as lawyers and judges if we attempted to meet the problem of eradicating the defects in the administration of justice merely by resorting to arbitration because of these defects and these delays. . . . Strongly as I favor arbitration, we, as lawyers, must never forget that our law is an inheritance from all the ages. We have worked out certain definite principles, certain definite rights, certain definite remedies. They are subject to improvement; they are subject to clearer statement; they are subject to greater exactness; they are subject to enormous improvement in their practical application, but I do not think that we are ready to throw them overboard and to substitute for them the arbitrary unappealable will of a single individual untrained in this, our legal inheritance.” Seven Lectures on Legal Topics, 1925-1926 (1929), 103.

⁵⁴ See page 425, *supra*.

applicable to all similar industry? Courts are a branch of our government, and so are our administrative tribunals. To oust them completely from what should be their normal function by the use of the word "arbitration," with the same verbal arguments as are applied to arbitration for the voluntary settlement of business disputes, to cover processes differing from each other in many respects and in many instances not arbitration, is open to rather severe criticism. Are private business boards, selected *ad hoc* for each case, to determine the statutes to govern industry, and decide the law applicable to it?

ARBITRATION PROVISIONS IN STANDARDIZED CONTRACTS—
USES AND LIMITATIONS OF THE PROCESS

Possessed of much propaganda and encouraged by the arbitration provisions in the Codes, trade associations are furnishing and will furnish industry with standardized contracts containing arbitration clauses.⁵⁵ But the Codes must not be interpreted as meaning to have these contracts provide for arbitration of every type of dispute which might arise out of the contract or business transaction. Arbitration is not a panacea for the settlement of every type of commercial controversy. Where the main dispute is factual, arbitration will admirably serve to resolve it.⁵⁶ Where the question is primarily legal, arbitration will fail miserably as a solution. The clauses must therefore be drawn with great care, and provide for

⁵⁵ See references cited notes 1 and 2 *supra*. The clause recommended by the American Arbitration Association is its general arbitration clause:

"Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction."

It should be noted that it is absolutely general in its application, and there seems no type of dispute which would not come within its purview. Such a clause seems repugnant to the idea of a standardized contract. On the one hand the contract is built up to assure uniformity of application of defined rules of law, while the clause in effect permits singular application of whatever principles the arbitrator wishes to apply to each case. See, for example, the Reinforcing Materials Code, which provides for arbitration as a standard practice.

⁵⁶ The law in almost all jurisdictions has for many years held that an agreement to submit certain facts to arbitrators as a condition precedent to suit is thus enforceable. See, for example, *Jones v. Enoree Power Co.*, 92 S.C. 263, 75 S.E. 452 (1912), and the many cases cited by Sturges, *op. cit. supra*, note 15, 71 *ff.* The reasoning of the courts that these agreements were not against public policy, whereas the general arbitration clauses were, is not as spurious as it is often made out to be. Recall that at the time the contracts are made, there are few who can predict exactly what types of dispute may arise, and to agree in advance to settle any and every type of dispute which may arise throughout the entire term of the contract may mean that the parties will later find they have waived their right to a judicial determination in cases most urgently demanding it. It is a dangerous expedient unless one is very familiar with all the vicissitudes which a contract may encounter, and is satisfied that all these should be settled by arbitration.

arbitration only for the specific type of foreseeable disputes for which it is suited and meant to apply.⁵⁷ The Corset and Brassiere Code, for example, shows a well considered limitation.⁵⁸ If the contract provides for arbitration of any and every dispute which may thereafter arise, the arbitration movement will collapse of its own weight. Business is certain to be disappointed by its use in cases for which it has no real helpful function, and may wrongfully condemn the entire proceeding.⁵⁹ The mere fact that the contract limits arbitration will not prevent two merchants from agreeing to arbitrate should there arise a type of dispute for which no provision has been made and which they then feel should be thus settled.

Trade associations might use something akin to the arbitration process to effect credit adjustments where the creditors are all members of one industry, and thereby avoid the rigors and waste of forced liquidation.⁶⁰ In corporate reorganizations, where the problem is one of business horse-trading, an analogous process may play a role and provide protection to security holders from arbitrary action by committees representing them.⁶¹ Arbitration is certain to be highly useful in disputes where the problem is one of accounting, quality, quantity, adherence to sample, or other business fact. Parties who are mutually agreed should be allowed to arbitrate whenever they wish. But what function have our courts in a nation dedicated to recovery by improvement of business conditions if it is not to adjudicate commercial controversies and thereby lay down rules of law which will assist in the recovery process? To strip them of this power would be collective *laissez faire* of a most unusual type, a species of fanati-

⁵⁷ It is with great deference to the undoubted authority of the American Arbitration Association that this statement is made. But it is believed they have been carried away by their enthusiasm for a proceeding, worthwhile in its proper sphere, to consider it as a panacea for all business disputes, which it most emphatically is not. See 31 Reports of the Association of the Bar of the City of New York 275 (1929).

⁵⁸ See *supra*, p. 432.

⁵⁹ No better illustration of the fact could be found than the recent case of Vitaphone Corp. v. Electrical Research Products, Inc., 166 Atl. 255 (Del. Ch. 1933), noted in 47 Harv. L. Rev. 126 (1933); 33 Col. L. Rev. 1440 (1933). As a result of too broad an arbitration clause the parties spent over two years in New York City in attempting arbitration of a dispute for which it was not a proper type of remedy, at an expense of \$750,000. Finally, in disgust, one of the parties brought suit in Delaware, a state not enforcing arbitration, and an unsuccessful attempt was made to stay the Delaware action.

⁶⁰ Cf. Billig, What Price Bankruptcy: A Plea for "Friendly Adjustment" 14 Corn. L. Quar. 413 (1929); Billig, Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases 78 U. of Pa. L. Rev. 293 (1930); Billig, A Realistic Approach to the Study of Insolvency Law 16 Corn. L. Quar. 542 (1931). See also Dewing, Creditor Committee Receiverships 1 Harv. Bus. Rev. 31 (1922).

⁶¹ Cf. Phillips, A Business Tribunal for Corporate Reorganizations 11 Harv. Bus. Rev. 178 (1933); Note 30 Col. L. Rev. 1025 (1930).

cal action one would expect in business anarchy and not in an industrial democracy based on a partnership between government and business.

CONCLUSION

Fortunately, the arbitration provisions of the Codes thus far adopted are in the main exhortatory and not mandatory. In so far as they encourage business men to arbitrate voluntarily in the proper cases, they will serve a useful purpose. In the event mandatory provisions are inserted, normal common law and statutory arbitration rules will not help enforce them. Mandatory general arbitration provisions in contracts will be enforced in only twelve states, and business will find that such enforcement robs it of the benefits which voluntary arbitration offers. Resort to the doctrines of "unfair competition" by courts to enforce arbitration provisions is unlikely. No one will dispute that legal reforms are necessary and that progress must be made in law to keep up with rapidly changing business conditions. To that task, lawyers should dedicate themselves. The task can be accomplished without the application of lynch law to business affairs. But to tie up a movement of legal reform (in which arbitration has a role) with a movement of business recovery seems likely to lead to confusion in which the needs of law will be neglected. Each deserves independent treatment.

ANTE MORTEM PROBATE: AN ESSAY IN PREVENTIVE LAW

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THERE is recrudescent in American legal thought today something of the spirit of Jeremy Bentham, that Don Quixote of English law who, for his utilitarian Dulcinea, took pen and tilted at those venerable anachronisms which Blackstone had endowed with a specious rationale and found a place for in the eternal order of things. If this interpretation of the *Zeitgeist* is correct, one may, perhaps, be condoned for essaying to joust with that formidable forensic windmill, the will contest.

The function of our testamentary law is to provide an efficient procedure for the transmission of property upon death in accordance with the will of its owner. Since its employment is optional, it can discharge that function only if it is generally regarded as satisfactory by those who may use it. We have, of course, no statistically aseptic data as to the public's attitude, and probably we never shall have; yet that fact should not preclude an appraisal of such evidence as is available.

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